

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.A No.355 of 2004

Reserved on : September 7, 2007.

Decided on : October 24, 2007.

Rakesh Kumar alias Ganga

...Appellant

Versus

State of Himachal Pradesh

...Respondent

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Rakesh Jaswal, Advocate.

For the Respondent : Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

Appellant Rakesh Kumar alias Ganga has filed this appeal against the judgment of the Sessions Court whereby he has been convicted of an offence punishable under Section 304 (second part) IPC and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- twice, one for committing culpable homicide not amounting to murder of Rasal Singh and another for causing death of Prabhat Chand.

2. First, the prosecution story may be narrated. On 7th November, 2003, PW-1 Pratap Chand, PW-2 Kartar Chand, PW-3 Kirpal Singh, one Harnam Singh and deceased Prabhat Chand and Rasal Singh went by a Jeep to village Rakkar Choli to enquire after the well-being of Satya Devi, an aunt of PW-1 Pratap Chand, who had met with an accident. On their way back, around 7.30 p.m.,

Whether reporters of the local papers may be allowed to see the judgment?

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when they reached a place called Jalari, falling within the jurisdiction of Police Station Nadaun, District Hamirpur, Bus No.HP-55-4386 was found parked in the middle of the road, which is a National Highway. When the driver of the Jeep, namely PW-2 Kartar Chand, tried to overtake the bus from its left side (which was the wrong side), appellant Rakesh Kumar alias Ganga, hereinafter called accused, who was in driver's seat of the bus, accompanied by three other persons, namely Ajit Kumar, Rajesh Kumar and Ajay Kumar, alighted from the bus and started hurling abuses at PW-2 Kartar Chand. When Kartar Chand and deceased Rasal Singh objected to the hurling of abuses by the accused, he and his abovenamed accomplices pulled deceased Rasal Chand out of the Jeep and started quarrelling with him. Deceased Prabhat Chand and driver of the Jeep Kartar Chand got down from the Jeep. The accused then took out a knife and stabbed Rasal Singh in his abdomen. He dealt another blow of knife on the thigh of Rasal Singh. When Prabhat Chand tried to overpower the accused, he too was stabbed in the abdomen (left side). Ajit Singh, one of the accomplices of the accused, took out an iron rod and hit PW-2 Kartar Chand on his legs. The other two accomplices of the accused kicked PW-2 Kartar Singh and deceased Prabhat Chand. Thereafter, the accused and his accomplices boarded the bus and fled away.

3. Both Rasal Singh and Prabhat Chand were taken to Nadaun hospital where Rasal Singh was declared brought dead and Prabhat Chand, after being given initial treatment, was referred to District Hospital, Hamirpur. From District Hospital, Hamirpur, deceased Prabhat Chand was referred to IGMC, Shimla, where he died on 16th November, 2003.

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4. Postmortem examination of the dead body of Rasal Singh was conducted by PW-5 Dr. D.R. Sharma, who noticed the following injuries:

1. Elliptical wound near umbilicus right side of midline 1 cm from midline lower end 9.5" from upper end of cimphysis pubes parallel to umbilicus vertically placed. Margin sharp cut, size 2 cm X .5 cm.
2. Stab wound 2.5 cm X .5 cm placed on anterior lateral aspect left thigh 5.5" from cimphysis pubes 4" below anterior superior iliac spine, 1.4 cm above the lateral apipondyl elliptical vertically placed bone deep with sharp cut margins.

On opening the abdomen, it was noticed that anterior wall of stomach was pierced and two fingers could be introduced into the hole. It was found to contain black granular material. Small intestine was found punctured at four places and the peritoneal cavity was full of blood about 1.5 litres. The doctor opined that the cause of death was haemorrhagic shock resulting from excessive bleeding through abdomen.

5. Postmortem of the dead body of Prabhat Chand was conducted by PW-4 Dr. V.K. Mishra, who noticed the following injures:

1. There was a colostomy bag present on outer aspect towards right side 4 cm from midline with colostomy stump attached to abdominal wall.
2. There was a spinal shaped incised wound on right lumber region 20 cm away from right nipple and 12 cm above superior most part of iliac crest in mid exillary line, 2.5 cm in length and was stitched with two silk sutures. The wound was obliquely placed. The depth of the wound was extending upto peritoneal cavity.
3. There was I shaped midline incision present on abdomen including umbilical area 22 cm in length stitched with 19 nylon/silk sutures.

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4. 1 X .5 cm abraded contusions was present with brown crust over abraded area on left side of chest in the infra mamary line 8 cm below left nipple. Yellowish in colour.
5. .5 X .5 cm small abraded contusion was present with brown curst over it on left side of chest. 3 cm below and lateral to injury No.4.

On opening the abdomen, the doctor found that peritoneum was grossly infected with close adhesions and redness. Small intestines were found adhered with each other and were red and friable. It was opined that all the aforesaid five injuries, except injury No.2, were the result of surgery conducted during the treatment of the deceased and only injury No.2 was ante mortem and it could have been caused by means of knife Ex. P-5. The cause of death was opined to be puss formation in the wound and septicemia which developed due to ante mortem injury.

6. Accused was arrested. He made a disclosure statement leading to the discovery of knife Ex. P-5. On the very day of the occurrence the police visited the spot, after registering the case, and found on the spot a pair of *Chappals*, which was identified to be that of deceased Rasal Singh. Some blood was also found on the spot and a part of blood stained earth was lifted from the spot and taken into possession.

7. Prosecution examined three of the four surviving occupants of the jeep, the two doctors, who conducted the postmortem examination of the dead bodies, a photographer, who took the photographs of the spot and the scene of recovery of knife at the instance of the accused, witnesses of recovery of knife, the doctor, who conducted the medico legal examination of deceased Prabhat Chand when he was taken to Civil Hospital Nadaun, the

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police officials, who investigated the case and also those who handled the case properly.

8. Accused and his accomplices denied their involvement in the commission of the crime. Suggestions were thrown to the eye-witnesses, namely PW-1 Pratap Chand, PW-2 Kartar Chand and PW-3 Kirpal Singh, that no incident had taken place in village Jalari and that in fact an incident had taken place at Rakkar Choli, where they had gone, in which some persons, other than the accused and his accomplices, caused the injuries to the deceased and PW-2 Kartar Chand. Witnesses denied the suggestions.

9. Trial Court concluded that the incident, as narrated by the eye-witnesses, had taken place and the accused was responsible for inflicting the fatal injuries to both the deceased, but at the same time it held that the incident having taken place on the spur of moment and the accused having dealt only two blows to deceased Rasal Singh, one of which was not on any vital part, and the other deceased Prabhat Chand having been dealt only one blow, in quick succession, in a minute or two, it could not be said that he intended to kill the deceased or to cause injuries likely to cause death in the ordinary cause nor could he be said to have had the knowledge that the stab wounds given by him were so imminently dangerous that, in all probability, they must cause death or such bodily injury as was likely to cause death, but he could be said to have had the knowledge that by his act he was likely to cause death and so his act fell within the mischief of Section 304 (second part) IPC instead of murder punishable, under Section 302 IPC with which offence he was charged.

10. It was submitted on behalf of the appellant that the evidence on record does not prove beyond reasonable doubt that the accused had inflicted fatal injuries on the persons of the deceased. In the alternative, it was submitted that, at the most, this was a case of grievous injury with sharp edged weapon, punishable under Section 326 IPC.

11. As regards the first submission of the learned counsel for the accused, we have thoroughly gone through the evidence led by the prosecution, particularly the testimony of the three eye-witnesses, namely PW-1 Pratap Chand, PW-2 Kartar Chand and PW-3 Kripal Singh. All of them have testified, very categorically, that on the fateful day, i.e., 7th November, 2003, they accompanied by the two deceased and one Harnam Singh had gone to village Rakkar Choli to see Smt. Satya Devi, who had met with an accident, and that while returning they found bus No. HP-55-4386 parked in the middle of the road at village Jalari, around 7.30 p.m., and when the said bus was being overtaken by their jeep from the *Katcha* side of the road, on the left side of the bus, accused accompanied by his three accomplices alighted from the bus and started hurling abuses at the driver. It has further been stated by all of them, with one voice, that when deceased Rasal Singh objected to the accused and his accomplices hurling abuses at them, he (deceased Rasal Singh) was pulled out of the jeep by the accused and his accomplices and when deceased Prabhat Chand and driver of the jeep PW-2 Kartar Chand went to the rescue of Rasal Singh, accused took out a knife and stabbed Rasal Singh twice, one in the abdomen and then in one of the thighs, and when deceased Prabhat Chand tried to overpower him he dealt a blow in his abdomen too and fled alongwith his

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accomplices in the bus. No material contradiction is there in the testimony of this witness. Also, we find no infirmity or inherent flaw in their testimony.

12. All of them were suggested, during the course of their cross-examination, that the incident had not taken place in village Jalari, as testified by them, but some incident had taken place in village Rakkar Choli where they had gone to see Satya Devi and it was there that the two deceased were stabbed by some other persons. They denied the suggestions. The plea of the accused, based on these suggestions, is falsified by the fact that on 7th November, 2003, itself police went to the spot and found there a pair of *Chappals* of deceased Rasal Singh and also found a lot of blood there and the pair of *Chappals* and blood stained earth were picked up from the spot and made into separate parcels, which were then sealed on the spot. The fact is testified not only by PW-1 Pratap Chand by whom the seizure Memos. of the pair of *Chappals* and the blood stained earth are attested, as one of the witnesses, but also by PW-15 Sub Inspector Hari Pal, who visited the spot. The statements of PW-1 Pratap Chand as also PW-15 Sub Inspector Hari Pal with respect to this fact were not subjected to cross-examination and, therefore, there should be no reason to disbelieve the same. Now, the presence of the pair of *Chappals* and blood on the spot not only corroborates the testimony of the eye-witnesses about the place of occurrence, but also negate the aforesaid defence plea.

13. Learned counsel for the accused submitted that no test identification parade had been arranged for the identification of the accused, who was not known to the eye-witnesses and the deceased from before. The contention that the accused was not

known to the eye-witnesses prior to the incident is not correct. PW-2 Kartar Chand, who is a driver by occupation, testified in no uncertain terms that he knew the accused even before the occurrence, because he too is a driver by occupation and both of them had been plying vehicles on the road on which the incident had taken place. There should be no reason to disbelieve the testimony of PW-2 Kartar Chand to this effect.

14. It was then submitted that according to the prosecution own version there were 10-12 shops near the site of the incident, but no independent witness had been examined. It is true that it has come in evidence that there were 10-12 shops on the two sides of the road where the incident had taken place and it is also a fact that no independent witness or anybody from those shops was produced by the prosecution but that by itself is no ground for doubting the prosecution version. The three eye-witnesses examined by the prosecution were in the company of the two deceased because they all were traveling by the same jeep. Therefore, they were the best witnesses. They cannot be termed as interested or partisan witnesses, simply on account of their being the companions of the deceased. This is especially so when there was no enmity between the deceased and the eye-witnesses on one hand and the accused and his accomplices on the other and the incident took place on the spur of moment, on a sudden quarrel, in the heat of passion.

15. As a result of the above discussion, we see no reason for interfering with the finding of the trial Court that it was the accused who dealt the fatal blows to the two deceased with a knife and, therefore, uphold the said finding.

16. Coming to the alternative submission of the learned counsel, the accused dealt knife blows to the two deceased in the abdomen. He was supposed to be knowing that stabbing a person in the abdomen, which is a very tender part of human body and in which there are vital organs like liver, kidneys, spleen, etc., could have resulted in death. Therefore, his act cannot be said to be an act done with the intention or knowledge of causing an injury only. The fact that he stabbed the two deceased in the abdomen with a knife, which is 11" long with blade length of 7.25", is enough to hold that he knew that his act was likely to cause death of his victims. Therefore, the alternative submission of the learned counsel for the accused is also rejected.

17. At one point during the hearing of the matter, we thought that the view taken by the trial Court that it was a case of culpable homicide not amounting to murder punishable under Section 304 (second part) IPC was not correct and that it appeared to be a case of murder punishable under Section 302 IPC. Therefore, we apprised the learned counsel for the accused of this thinking of ours impliedly, vide our zimini order dated 20th August, 2007, so that the accused had the notice and consequently an opportunity to show that this was not a case of murder. However, on a thorough reading of the evidence, we feel that the view taken by the trial Court may not be incorrect and in any case we should not disturb the finding of the trial Court particularly when the State has not filed any appeal seeking the conviction of the accused under Section 302 IPC and award of enhanced punishment.

18. As already stated, accused dealt one blow in the abdomen to each of the two deceased and one blow on the thigh of

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deceased Rasal Singh, in addition to the one in the abdomen. PW-5 Dr. D.R. Sharma, who conducted the postmortem of the dead body of Rasal Singh, testified that the cause of death was haemorrhagic shock due to excessive bleeding in the abdomen. He did not say that any vital organ of the deceased had been damaged. Second blow was given by the accused to deceased Rasal Singh on the thigh and not on any vital part or even in the abdomen, which fact suggests that he did not intend to cause the death or any injury, which could have caused the death of deceased Rasal Singh. As regards the second deceased, the opinion given by PW-4 Dr. V.K. Mishra, who conducted the postmortem, is that the cause of death was not the injury inflicted by the accused but puss formation and septicemia which resulted from the injury.

19. As a result of above discussion, appeal is dismissed. Judgment of the trial Court convicting and sentencing the accused, as aforesaid, is upheld.

(Surjit Singh), J.

October 24, 2007_(sd)

(Surinder Singh), J.